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In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-556

UNITED STATES STEEL CORPORATION,
Petitioner,

vs.

FRANCIS R. PECK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eighth Circuit.

LUCIAN Y. RAY,
ROMAN T. KEENEN of
McCREARY, RAY & ROBINSON,
1550 Union Commerce Building,
Cleveland, Ohio 44115,
Attorneys for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Eighth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, United States Steel Corporation, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled matter on August 20, 1971.

OPINIONS OF THE COURTS BELOW.

The opinion of the United States District Court for the District of Minnesota, Fourth Division, is reported at 315 F. Supp. 905 and is set forth at p. 16, *infra*. The opinion of the Court of Appeals for the Eighth Circuit is unreported (*infra*, p. 33).

JURISDICTION.

The judgment of the Court of Appeals, affirming the District Court, was entered on August 20, 1971 (*infra*, p. 35). The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1254(1).

QUESTION PRESENTED.

Whether a shore-based ironworker, injured on an incompleted vessel not in navigation and while not doing work traditionally done by seamen, is entitled to the warranty of seaworthiness.

STATUTES INVOLVED.

There are no statutes involved. Count I of the complaint sought the recovery of damages under the Jones Act (46 U.S.C.A. Sec. 688). The District Court ruled that the suit had not been filed within the three-year limitation period of that statute and that Count I was barred. No appeal was taken from that ruling.

STATEMENT OF FACTS AND OF THE CASE.

This action was brought by Francis R. Peck against United States Steel Corporation seeking damages allegedly caused by negligence and/or breach of the warranty of seaworthiness. The complaint was in three counts. Count I sought damages under the Jones Act. Count II sought damages for unseaworthiness. Count III sought the recovery of maintenance and cure. The trial commenced on April 22, 1970, before the Honorable Earl R. Larson, District Judge, sitting without a jury.

The petitioner adopts as a part of its statement of facts the following findings of fact made by the District Court:

1. Plaintiff, an Indian with a fifth grade education, is now thirty-four years old. He has been a member of the Ironworker's Union since May 17, 1963.

During the spring and summer of 1964 he was employed by defendant in the construction of missile sites in North Dakota. In the spring of 1965 he was called by the American Bridge Division of defendant to work at the site of the construction of the Platte-Wenner Bridge. This bridge was to be about a mile in length and was to span the Fort Randall Reservoir, a part of the flood control system on the Missouri River. The Missouri River is a navigable river and the Fort Randall Reservoir is a part of that river. American Bridge Division had a contract for the superstructure or steel erection work on the girder span bridge.

2. Plaintiff arrived at the construction site on or about May 3, 1965, eight days before the accident which is the subject of this action. About six other workers were already at the site, engaged primarily in putting together an S2 derrick barge. Plaintiff had no prior experience

with the S2 derrick barge and had not seen one prior to beginning work on this project.

3. The girder span bridge superstructure is built by placing steel girders onto bridge piers, which had been installed prior to the beginning of defendant's part of the project. The S2 derrick barge is used to lift the steel erection materials from a supply barge and to place them in their proper position in the bridge work.

4. All materials used in the construction work, including the component parts of the S2 derrick barge, were transported to an area near the bridge site by rail and by truck. The equipment to be used for the construction work, including the S2 derrick barge, a materials barge, a towboat or Tesco tug, and a 100-ton Manitowoc crane, were assembled on the river bank about 1,000 to 2,000 yards from the bridge site.

5. The S2 derrick barge consists of eighteen pontoons, which are bolted together to form a large platform unit. Each pontoon is welded to insure its watertight integrity. The pontoons are then lifted onto the water by means of the shore-based 100-ton Manitowoc crane. They are bolted together forming an overall deck structure about 108 feet in length and 54 feet in width. The grillage or sill beams are laid across the width of the deck and welded to the pontoons. The sill beams are the structural members which bear the weight of the derrick tower and load. Initially, light welding or tacking is used to hold the sill beams in place. Heavy welding is then needed to hold the beams in their permanent position.

* * * * *

8. The S2 derrick barge has no motive power of its own. It is towed from the riverbank mooring to the construction site and is anchored there. It is able to move

about the bridge piers by alternating tension on the various lines connected to the four anchors. The anchors are fastened to heavy cables which are threaded around the perimeter of the barge through fairleads located at the four corners of the barge. The fairleads and their supports must be welded to the deck of the barge. The stringing of the cable requires a good deal of precision in order for the elaborate anchoring system to operate effectively.

We continue with the statement of facts which are pertinent to the question presented in this petition, with supporting appendix references.

On the day of the accident and for several days prior thereto, the S2 derrick barge was partly floating on the river and partly resting on the riverbed (App. pp. 69, 86). It was secured to the shore by three or four mooring lines. The lines were primarily slack safety lines, since the semi-grounded condition of the structure secured it against movement. The river was approximately twenty-eight feet deep on the outside of the barge. On the shore side the river was eleven inches deep and the underside of the barge was resting on the river bottom to give greater stability and security to the assembly operations (App. pp. 69, 86). Because of changing wind and water level conditions in the Fort Randall Reservoir, periodic checks were made during non-working hours to make certain the craft was properly secured (App. p. 69). Access to the barge was by means of a fifteen to twenty foot plank extending from the river bank over the water to the deck of the barge.

On the day of the accident the structure was 70-75% completed (App. p. 60). An additional 4-5 days or more (depending on availability of labor) would have been necessary to complete assembly work on the derrick barge

in order to make it ready for service (App. pp. 64, 71, 137). Substantial welding remained to be done; bolting and fastening of the pontoons was 60% completed (App. pp. 64, 73, 134). No water pumping into or among the pontoons had yet been done to make water ballast adjustments to compensate for the uneven weight distribution on the structure (App. p. 73). The pontoons were being checked and adjusted for leakage. The anchor lines hoisting engine was not yet completely attached to the deck (App. pp. 71, 72).

The derrick equipment was unfinished and unfit for use on the day of the accident (App. pp. 59, 60, 74, 100). The derrick tower, an integral part of the derrick equipment, was not yet welded to the deck (App. pp. 74, 101).

The designed and intended service of the S2 derrick barge was the erection of structural steel at the bridge erection site (App. pp. 112, 114).

On the day of the accident plaintiff had been assigned to a variety of tasks involving construction of the derrick barge (App. p. 65). These included tightening bolts on the tower leg, helping in the welding of the front beam and clean-up work connected with the construction of the derrick (App. p. 65). Immediately prior to the accident, he was cleaning up the deck of waste material used in fabricating the unit (App. p. 65). Plaintiff's clean-up of construction material was work incident to his general duties in helping construct the derrick barge (App. pp. 59, 116).

Sometime during the day of May 11, 1965, James P. Ralston, the plaintiff's immediate superior, decided to attempt to pick up the Tesco tug and place it in the water. As the attempted lift was being made and when the tug was about twelve feet in the air, the entire tower collapsed. As it collapsed, a 100-gallon propane gas tank ruptured

and exploded resulting in the plaintiff being severely burned and thrown into the water.

The immediate cause of the accident was the fact that the derrick tower was not yet welded to the deck (App. pp. 84, 101). Ralston was negligent in attempting to use the lifting equipment on the unfinished derrick at the time when he knew this equipment was not yet properly assembled or attached (App. p. 85).

The District Court ruled that the derrick barge was a "vessel" which was subject to the warranty of seaworthiness; that the type of work in which the plaintiff was engaged at the time of his injury was the type traditionally done by seamen and was of the general type of maintenance work that would have continued when the vessel was at the bridge site; that although the derrick barge was admittedly not fully constructed, the act of attempting to raise the tug constituted a warranty that the lifting equipment was seaworthy for the use for which it was intended (Appendix, pp. 28-29 and 31-32, *infra*).

The District Court concluded as a matter of law that the plaintiff was "a shore-based worker on a vessel in navigation doing a seaman's work and was within the class of workers protected by a warranty of seaworthiness" (Appendix, p. 27, *infra*).

Judgment was entered for the plaintiff and against the defendant in the sum of $69,795.43, plus interest and costs (Appendix, p. 28, *infra*).

The Court of Appeals in a *per curiam* opinion filed on August 19, 1971, ruled that the findings of fact of the trial court were not clearly erroneous and that that Court had correctly applied the law to the facts, as found. The judgment was affirmed on the basis of the opinion of the District Court (Appendix, pp. 33-35, *infra*).

REASONS FOR GRANTING THE WRIT.

I.

This petition presents the important question of whether a shore-based ironworker, injured while performing the ordinary duties of his trade on an unfinished vessel not in navigation, is entitled to the warranty of seaworthiness. It involves an interpretation of the rulings of this Court in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) and *Pope & Talbot v. Hawn, Inc.*, 346 U.S. 406 (1953) and specifically, by ruling in *Hawn* that the warranty should apply to a shore-based worker who was repairing grain-loading equipment, this Court intended to include all shore-based workers who are doing work on a vessel. If the application of the warranty is to be limited to shore-based workers who are doing the work traditionally done by "seamen" and are subjected to their hazards, then the doctrine of *Hawn* should be reaffirmed. If, on the other hand, it was not the intention of this Court in that decision to impose any restrictions as to the type of work or worker to be covered, then that intention should be made unmistakably clear.

The ruling of this court in *Hawn* on the question of indemnity for unseaworthiness was not unanimous. In a dissenting opinion by Mr. Justice Jackson, in which he was joined by Mr. Justice Reed and Mr. Justice Burton, it is stated (346 U.S. at page 423):

> "I think that the expansion of the warranty of seaworthiness from a seaman to a repairman is illogical, contrary to any decisional law and not consistent with the scheme of Congress to maintain a sharp distinction between the seafaring man and the harbor worker."

The misgivings of certain members of this Court concerning the expansion of the protection of the warranty

was evidenced in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, the decision which first extended its protection to "those who do not go down to the sea in ships." The views of Mr. Chief Justice Stone, Mr. Justice Frankfurter and Mr. Justice Burton are expressed in a strong dissenting opinion.

In *United Pilots Assn. v. Halecki*, 358 U.S. 613, this Court indicated that it was not prepared to extend the doctrine of *Sieracki* and *Hawn*. In that case, which involved the death of an employee of a sub-contractor who was on board to clean the generators, this Court, speaking through Mr. Justice Stewart, and referring to *Sieracki* and *Hawn*, said (p. 617):

> "Neither these decisions nor the policy that underlies them can justify extension of liability for unseaworthiness to the decedent in the present case. The work that he did was in no way 'the type of work' traditionally done by the ship's crew. It was work that could not even be performed upon a ship ready for sea, but only when the ship was 'dead' with its generators dismantled. Moreover, it was the work of a specialist, requiring special skill and special equipment—portable blowers, air hoses, gas masks, and tanks of carbon tetrachloride, all brought aboard the vessel for this special purpose, and none connected with the ship's seagoing operations. * * *"

At page 618, this Court said:

> "* * * It is scarcely more helpful to indulge in the euphemism that the decedent was 'cleaning' part of the ship, and to say that it is a traditional duty of seamen to keep their ship clean. The basic fact is, in the apt words of Judge Lumbard's dissenting opinion in the Court of Appeals, that the decedent 'was not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed.' 251 F.2d 708, at 715. To extend liability for

> unseaworthiness to the decedent here would distort the law of *Mahnich*, of *Hawn* and of *Sieracki* beyond recognition.* * *"

As recently as *Usner v. Luckenbach Overseas Corp.*, 91 S. Ct. 514 (1971), this Court had reason to refer to the doctrine of unseaworthiness as the basis for a shipowner's liability for personal injuries or death and the substantial number of Justices who disagreed with the expansion of the unseaworthiness doctrine. There this Court, speaking through Mr. Justice Stewart, stated (p. 516):

> "The development in admiralty law of the doctrine of unseaworthiness as a predicate for a shipowner's liability for personal injuries or death has been fully chronicled elsewhere, and it would serve no useful purpose to repeat the details of that development here. Suffice it to recall that from its humble origin as a dictum in an obscure case in 1922,[4] the doctrine of liability based upon unseaworthiness has experienced a most extraordinary expansion in a series of cases decided by this Court over the last 25 years.[5] The Court's decisions in some of those cases have been severely questioned, by dissenting Justices and by others, on the basis of history, reason and logic.* * *"

There is no factual dispute herein as to the nature of the respondent's work prior to and at the time of the accident. He was, as the courts below found, engaged in tightening the bolts on the tower leg, doing welding on the front beam and general clean-up work (p. 21, *infra*). This was work that was being done in connection with completing the construction of the derrick barge. All of the jobs, including the task of cleaning up, were related to the construction of the vessel and to respondent's work as an ironworker.

The tasks being performed by the respondent, with the exception of the clean-up work, were those of an iron-

worker, a specialist. It was not work that was being done in the service of the vessel but was a necessary part of the construction of the craft. "Neither in legal theory nor in fact" was the respondent performing work traditionally done by seamen.

The Circuit Court of Appeals for the Second Circuit did not read *Sieracki* as intending to extend the protection of the warranty of seaworthiness to all workmen on a vessel. *Guerrini v. United States,* 167 F.2d 352 (CCA 2, 1948), involved an injury to the employee of a sub-contractor who was engaged to clean the boilers and tanks of a vessel moored at the contractor's dock. In referring to *Sieracki,* the Court said (p. 354):

> "* * * The grounds of the majority in Seas Shipping Co. v. Sieracki, supra, were that a stevedore performs part of the 'ship's service,' more particularly that: 'Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew' (page 96 of 328 U.S., page 878 of 66 S. Ct.). * * * Yet we should hesitate to read the decision as intended to extend the protection of what amounts to a warranty of seaworthiness to all workmen upon a ship, however casual their presence there, and however much their relation to the employer is unlike the early paternalistic status of master and crew, many of whose features have vestigially persisted to the present time. At any rate it is proper, if such an innovation is to be made, that it should await the sanction of the Supreme Court in the exercise of its function of supplying the inadequacies of the past. The libellant does not assert any such claim; and we hold that the respondent was not in duty bound to furnish him with a seaworthy ship."

This petitioner also awaits a determination by this Court as to whether or not a further expansion of the unseaworthiness doctrine is either justified or required.

II.

Even though a shore-based worker may belong to a class to which the warranty of seaworthiness applies, he is not, under decisions of this Court, entitled to the protection of the warranty if the work he was doing was being performed on a vessel which was not in navigation. The District Court conceded that there was considerable force in defendant's argument that shipbuilding is non-maritime but declined to follow *West v. United States,* 361 U.S. 118 (1959), *Roper v. United States,* 368 U.S. 20 (1961) and the other cases relied upon by the defendant on the ground that the derrick barge was being readied for navigational use and on the day of the accident the defendant had determined that it was ready for such use (pp. 30-32, *infra*).

In the instant case, navigational use, in the ordinary sense of that term, was not contemplated. After the construction of the derrick barge was completed it was due to be moved to the bridge site where it would be used as a floating platform from which steel members could be hoisted into place on the bridge structure (pp. 17 and 19, *infra*).

The petitioner concedes that its foreman was guilty of negligence in ordering the lifting of the tug before the rear leg of the derrick tower was made fast to the sill beam and the barge itself was completely constructed. We know of no principle of law or of reason which justifies the conclusion of the District Court that the negligent act operated to bring about the completion of a vessel which, in fact, was not complete and the placing of the vessel in navigation when, in fact, it was not in navigation.

We are still of the view that our reliance, in the lower courts, upon *West* is justified. This Court, in that case, pointed out that the work being done on the vessel was

equivalent to "home port structural repairs." It further pointed out that in the cases relied upon by the personal injury claimant the vessels "were in active maritime service in the course of loading and unloading cargo pursuant to voyages and that in those cases the workmen, like the seamen, depended upon the seaworthiness of the ships, their equipment and gear." (361 U.S., at p. 121). In the instant case, where the situation is comparable to incompleted structural repairs, but even stronger in petitioner's favor, it would be unfair, as this Court said in *West*, "to say that the vessel owner held the vessel out as seaworthy" (p. 122). There was no justification, on the part of the respondent, for any reliance upon the seaworthiness of equipment which had not been completely assembled.

In *Roper v. United States*, 368 U.S. 20, this Court reaffirmed the ruling in *West* that the test for determining whether a vessel is in navigation is the "status of the ship." The Court pointed out that the vessel had not been converted to any navigational use; that she had no motive power of her own; that the men on board her were not signed on as seamen and that, for all practical purposes, she was simply a floating warehouse. In the case at bar the S2 had no motive power of her own, the men on board were ironworkers, not seamen, and her status was that of an incompleted vessel, uncommitted, at that time, to navigational use.

The case of *Frankel v. Bethlehem-Fairchild Shipyard, Inc.*, 132 F.2d 634 (CCA 4), contains strong language in support of the proposition that the warranty of seaworthiness does not apply to work being done on an incompleted vessel. At page 635 the Court said:

> "Accordingly, since a contract for the building of a ship is non-maritime in character, a tort arising out of work on a launched but incompleted vessel also

lacks maritime flavor, *despite the fact that the vessel is lying in navigable waters. Furthermore, an incompleted vessel has yet to take her place in commerce and navigation*; whereas a vessel which has been commissioned and taken into navigation and commerce remains in that status even when coming into a dock and undergoing certain repairs." (Emphasis supplied.)

At page 636 the Court stated:

"* * * This is in accord with our ruling in United States Casualty Co. v. Taylor, 64 F.2d 521, 524, 545, certiorari denied 290 U.S. 639, 54 S. Ct. 56, 78 L. Ed. 555, where the employee was similarly injured while 'engaged upon navigable waters in the completion of a new ship launched but not quite finished or placed in navigation as an instrumentality of commerce. Such work is not maritime in the accepted meaning of that term.' * * *"

In *Lyon v. United States*, 163 F. Supp. 206 (D.C. E.D. N.Y. 1958) aff. 265 F.2d 219 (CCA 2), the libelant was in the employ of an independent contractor and was engaged, at the time of his injury in setting the outboard base of the No. 4 lifeboat. In discussing the warranty of seaworthiness doctrine, the Court stated (pp. 207, 208):

"Lyon was a business invitee in the employ of Project. His occupation was not that of a seaman either in fact, or judicial theory. See Rich v. U.S., 2 Cir., 192 F.2d 858; Berge v. National Bulk Carriers Corp., D.C., 148 F. Supp. 608; 2 Cir., 251 F.2d 717, certiorari denied, 356 U.S. 958, 78 S. Ct. 994, 2 L. Ed. 2d 1066. He was engaged as a rigger in a repair job on a ship that was afloat, but not in operation. Her engines were being overhauled and repaired, and could not function on June 2, 1952, or for many days prior.

"To exact from her owner anything that could even by remote suggestion be termed seaworthiness,

would be to impute to that expression a meaning which even the most ardent pursuit of underwriting liability would not justify."

Employees who are injured on a vessel not in navigation are not seamen and are not doing seamen's work. The respondent herein was unquestionably in that category.

CONCLUSION.

It is necessary for this Court to review the decisions below to settle a question of admiralty law of fundamental importance. It is a question which is not confined to the litigants herein but will have a decisive bearing upon the rights of all shore-based workers who perform services upon a vessel on navigable waters. To that end the judgments below should be reviewed and reversed.

Respectfully submitted,

LUCIAN Y. RAY,
ROMAN T. KEENEN,
MCCREARY, RAY & ROBINSON,
Counsel for Petitioner.

APPENDIX.

FINDINGS, CONCLUSIONS, ORDER AND OPINION OF THE TRIAL COURT.

No. 4-68-Civil 376

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA,
FOURTH DIVISION.

FRANCIS R. PECK,
Plaintiff,

vs.

UNITED STATES STEEL CORPORATION,
a corporation,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT.

The above entitled action by the plaintiff Francis R. Peck is a claim against United States Steel Corporation seeking damages for personal injuries caused by the negligence and/or breach of warranty of seaworthiness of United States Steel. The complaint is in three counts. Count I seeks damages under the Jones Act. Count II seeks damages for unseaworthiness. Count III asks for maintenance and cure. Defendant has admitted a negligent act by one of its employees caused plaintiff's injuries, but denies plaintiff is entitled to recover damages in this action.

This case came on for trial commencing April 22, 1970, before the Court without a jury. Attorneys James R. Schwebel and William H. LeParcq appeared for plaintiff and Attorney Benjamin F. Cornelius appeared for the

defendant. The Court having heard the evidence adduced in behalf of all parties, and upon all of the files, records and proceedings had herein, and the Court being fully advised in the premises, and having considered the evidence adduced, now makes the following:

FINDINGS OF FACT.

1. Plaintiff, an Indian with a fifth grade education, is now thirty-four years old. He has been a member of the Ironworker's Union since May 17, 1963. During the spring and summer of 1964 he was employed by defendant in the construction of missile sites in North Dakota. In the spring of 1965 he was called by the American Bridge Division of defendant to work at the site of construction of the Platte-Wenner Bridge. This bridge was to be about one mile in length and was to span the Fort Randall Reservoir, a part of the flood control system on the Missouri River. The Missouri River is a navigable river and the Fort Randall Reservoir is a part of that river. American Bridge Division had the contract for the superstructure or steel erection work on the girder span bridge.

2. Plaintiff arrived at the construction site on or about May 3, 1965, eight days before the accident that is the subject of this action. About six other workers were already at the site, engaged primarily in putting together an S2 derrick barge. Plaintiff had no prior experience with the S2 derrick barge and had not seen one prior to beginning work on this project.

3. The girder span bridge superstructure is built by placing steel girders onto bridge piers, which had been installed prior to the beginning of defendant's part of the project. The S2 derrick barge is used to lift the steel erection materials from a supply barge and to place them in their proper position in the bridgework.

4. All materials used in the construction work, including the component parts of the S2 derrick barge, were transported to an area near the bridge construction site by rail and by truck. The equipment to be used for the construction work, including the $2 derrick barge, a materials barge, a towboat or Tisco tug, and a 100-ton Manitowac crane, were assembled on the river bank about 1,000 to 2,000 yards from the bridge site.

5. The S2 derrick barge consists of eighteen pontoons, which are bolted together to form a large platform unit. Each pontoon section is welded to insure its watertight integrity. The pontoons are then lifted into the water by means of the shore-based 100-ton Manitowac crane. They are bolted together, forming an overall deck structure about 108 feet in length and 54 feet in width. Then grillage or sill beams are laid across the width of the deck and welded to the pontoons. The sill beams are the structural members which bear the weight of the derrick tower and load. Initially, light welding or tacking is used to hold the sill beams in place. Heavy welding is then needed to hold the beams in their permanent position.

6. The derrick tower is 65 feet high and is triangular at its base. The two rear legs of the tower are placed on two sill beams located slightly behind the center line of the deck. The engine, three-drum hoist and operator's controls for the derrick are located on the rear one-third of the deck. The 75-foot derrick, the mast, the bull wheel to swing the boom, and the boom are installed on the tower. The main load fall consists of a block with eleven sheaves.

7. In addition to the three-drum hoist and engine supplying power for the hoisting operations of the derrick, a second three-drum hoist and engine is located at the rear

of the barge for use in operating the anchor lines used to to maneuver the barge and to hold it stationary during the actual lifting operations.

8. The S2 derrick barge has no motive power of its own. It is towed from the riverbank mooring to the construction site and is anchored there. It is able to move about the bridge piers by alternating tension on the various lines connected to the four anchors. The anchors are fastened to heavy cables which are threaded around the perimeter of the barge through fairleads located at the four corners of the barge. The fairleads and their supports must be welded to the deck of the barge. The stringing of the cable requires a good deal of precision in order for the elaborate anchoring system to operate effectively.

9. The towboat or Tisco tug's larger components are two hull sections which are bolted together, plus a cabin which is bolted over the top. The tug, when completed, weighs about fifty-three tons. After preliminary assembly of the hull sections on land, the tug is placed in the water, where additional preparation for service is made.

10. On the day of the accident, and for several days prior thereto, the S2 derrick barge was floating on the river and was secured to the shore by three or four mooring lines. The river was approximately twenty-eight feet deep on the outside of the barge. On the shore side the river was eleven inches deep and the underside of the barge was resting on the river bottom. Without the mooring lines the barge was free to float down the river, and periodic checks were made during non-working hours to make certain the craft was properly secured. Access to the barge was by means of a fifteen to twenty foot plank extending from the river bank over the water to the deck of the barge.

11. On the day of the accident the pontoon and deck structure was not completed. Some minor bolting remained to be done on the pontoons and water to counterbalance the weight of the engines and hoists had not been pumped into the forward pontoons. The pontoons were being checked for possible leakage, a procedure that was carried out even after the derrick barge was at the bridge site.

12. The derrick tower and the derrick were completed and ready for lifting, except that the left side of the rear sill beam had not been welded down and the right side of the rear sill beam was only 60% welded down, and there was thus inadequate attachment of the tower leg to the deck structure.

13. The anchoring system was essentially incomplete. The anchors were on board the barge but they were not attached to the anchor line. The anchor fairleads at each corner of the barge were tack welded into place and the final welding process was just beginning. Three of the tiedowns from the tower to the sill beam were completed. The fenders or bumpers to protect the tiedowns were not installed. The safety walkways and stairs over the sill beams were not installed, nor was the platform around the front leg of the derrick tower. An air compressor used in the operation of small power tools was also not affixed. A shed used by workers for shelter from bad weather, for eating, and for changing clothes had not been installed.

14. The design purpose of the S2 derrick is to lift various materials. The anchoring system is designed to facilitate the use of the derrick barge in bridge building. While the anchoring system is essential to the use of the S2 derrick at the bridge site, the derrick barge may be used for its design purpose in other situations without the

anchors. For example, other S2 derricks have operated along a shoreline or riverbank without anchor lines and can be used in this manner to pick up materials on shore or on another barge and move them anywhere within the radius of the crane.

15. In fact, defendant knew this particular S2 derrick barge would be put to such a use, *i.e.*, lifting the Tisco tug into the water, before the river equipment was installed.

16. At the time of the accident, the S2 derrick barge had all the equipment on board needed for use for its design purpose—lifting. The Tisco tug pick could have been made safely had it not been for defendant's negligence in attempting the pick without the sill beam properly tied down.

17. The shed, walkways and bumpers are not essential to the operation of the S2 derrick for its design purpose, and are not essential even when the S2 derrick barge is used in river operations.

18. On the day of the accident plaintiff had been assigned to a variety of tasks, including tightening bolts on the tower leg, helping in the welding of the front beam, and general cleanup work. Immediately prior to the accident he was cleaning up the deck of the barge of excess waste material, including nuts and bolt and cable. These materials constituted a potential safety hazard to other workers. Deck cleanup work was a normal part of the barge operation, and would continue to be carried on after the barge was put to use at the bridge site. Plaintiff's work served generally the same purpose as would the safety walkways and stairs, namely, to enable the members of the barge crew to move safely and easily about the barge while performing their assigned duties.

19. Plaintiff's immediate superior was James R. Ralston. Plaintiff reported to Ralston each day and did not know from day to day what his assigned task would be. On the day of the accident and for the days prior thereto, plaintiff's duties were confined almost exclusively to work on the S2 derrick barge.

20. Some time during the day of May 11, 1965, a decision was made by Ralston to attempt a pick up of the Tisco tug for the purpose of placing it in the water. Wallace, an experienced hoist operator and the man hired to operate the hoist during bridge construction, was informed that he should stand by. Wallace knew the rear grillage beam was not welded down and expressed concern about this fact to Ralston. The latter said he would "take care of it."

21. About three o'clock Ralston gave orders to Wallace to make a test lift. Wallace swung the derrick out over land and hooked onto the Tisco. He raised the tug about a foot-and-a-half off the riverbank and proceeded to check out his drawworks, including the hoist and swing frictions. He was not completely satisfied with the efficiency of the braking system and lowered the Tisco in order to reset his systems. Then he picked up the tug a second time, hoisting it four to five feet off the river bank. Then he raised the boom to bring the load closer to the mast. The tug was by this time about twelve feet in the air.

22. Ralston, who was directing the operation from the riverbank, then gave the signal to swing the tug out over the water. Wallace maneuvered the tug over the water until Ralston ordered the swing stopped. At that point the entire tower collapsed and the barge listed severely toward the open water.

23. As the tower collapsed, a one hundred gallon propane gas tank was ruptured and exploded. Plaintiff was burned severely and was thrown into the water.

24. The immediate cause of the accident was the fact that the rear leg of the tower was not adequately affixed to the sill beam. Ralston should have known that the pick could not have been made safely with the derrick tower in that condition. He nevertheless determined that the S2 derrick barge was ready for the use which he intended to put it to.

25. Ralston thought the tug weighed about twenty-three tons. Since the S2 derrick has a lifting capacity of seventy-five tons under ideal conditions, he thought the tug lift could be made safely even with the leg not completely welded down. In fact, the fifty-three ton weight of the tug placed too great a strain on the tower.

26. In the three-and-a-half years from the time of the injury until this action was commenced, plaintiff and his wife consulted three lawyers with regard to plaintiff's injuries. Each visit to a lawyer was prompted by a delay in the receipt of workmen's compensation checks from defendant and was for the purpose of determining if something could be done about getting the checks on a more regular basis.

27. In the spring of 1966 plaintiff and his wife consulted with A. William Spiry and Frank Farrar, attorneys in practice together in Britton, South Dakota. The facts and circumstances of the accident and injury to plaintiff were explained to each of the attorneys separately. Mr. Spiry made inquiry of defendant to determine the possible existence of third-party liability. The advice of Mr. Spiry and Mr. Farrar was solicited as to any remedies other than or in addition to workmen's compensation. Each attorney

advised plaintiff that his only remedy was under the workmen's compensation laws.

28. In April of 1967 John Weekman, a claims representative of defendant, visited plaintiff and his wife at Kidder, South Dakota. Weekman advised plaintiff his only remedy was under the South Dakota workmen's compensation law. Weekman believed this advice to be accurate and it did not occur to him there was a possible claim under admiralty laws.

29. Plaintiff and his wife subsequently contacted L. R. Gustafson, an attorney at Britton, South Dakota. Again, the main concern was delay in the receipt of compensation checks. Upon learning of the facts relative to the accident and injury, Gustafson advised plaintiff his only remedy was under the workmen's compensation law.

30. Plaintiff believed and relied on the advice given to him by his attorneys. Mr. Weekman made no representation that differed in any way from the advice plaintiff received from his own counsel.

31. Mr. Weekman was in charge of the investigation of the accident in which plaintiff was injured on behalf of the defendant. He learned of the accident within minutes of its occurrence and via telephone directed that an investigation be undertaken immediately. The investigation included photographs of the barge and collapsed tower and interviews with all persons present at the job site during that day. The investigation was complete and thorough and defendant has not been prejudiced in any way in preparing to defend this action by the fact that suit was not commenced until three-and-a-half years after the accident.

32. Plaintiff was taken from the accident scene by ambulance to the Platte, South Dakota, hospital. He was

burned on the legs, arms, chest, back, face and groin. All his hair had burned off. His hands, which had been protected by heavy gloves, were not burned. Plaintiff remained at the hospital until July 17, 1965, and was in intense pain for most of that time.

33. After his release from the hospital plaintiff attempted work as a truck driver at $2.10 per hour. Because of his residual injuries he found that work too difficult and quit after a week.

34. In 1966 he got a job feeding sheep at $1.05 per hour and held that job for about three months. Again, the residual effects of his injuries forced him to quit.

35. In February of 1968, two years and nine months after the accident, plaintiff returned to iron working on a full-time basis at union scale. At the time of the accident he had been getting $4.17½ per hour for a forty hour week, plus $3.00 daily subsistence allowance. Plaintiff's average earnings were $650.00 per month for a six month season. He has lost approximately $11,200.00 in wages due to his disability.

36. In 1967 plaintiff underwent a skin graft at the Mayo Clinic. Skin taken from plaintiff's right leg was grafted onto his right arm. He was hospitalized about one month. Plaintiff's arms remain his chief cause of complaint. They ache in winter and itch in summer. For several years after the accident he used a wire painter's brush to scratch his arms, but he uses that only occasionally now. He sleeps with his arms at his sides and experiences what he feels is a loss of strength in his arms. He sometimes requires assistance in the heavy lifting required by his employment.

37. Dr. Samuel G. Balkin, an expert in plastic and reconstructive surgery, examined plaintiff shortly before

trial and also reviewed the hospital records and reports of other examining doctors. Defendant did not offer any medical testimony.

38. Dr. Balkin found that plaintiff has scar tumors on each ear, with the scar on the right ear more prominent. He has evidence of second degree burns on his nose, cheeks and chin, as primarily evidenced by scarring and enlarged skin pores. He has dense scarring in the center of the upper lip. He has a scar below the left corner of the mouth. He has scarring on the left side of the upper neck just below the jaw. This scar tissue tightens as the neck is stretched. There is also scarring on the right side of the neck.

39. There is evidence of second and third degree burn scarring on the outer aspect of the right upper arm and very dense scarring at the right elbow. The right forearm is covered by a skin graft. This graft is thin. Underneath it is a layer of scar tissue which serves to glue the new skin to the muscle. The graft has a discoloration and resembles a patch. This discoloration cannot be disguised.

40. There is a hypertrophic scar on the left forearm. While a blow to the right elbow could crack the scar tissue, the left elbow is capable of withstanding certain trauma.

41. Plaintiff should undergo several surgical procedures. The keloid scars on the ears should be cut out and certain grafts performed. The keloid tissue continues to grow and may become like a tumor. The total cost of the surgical procedures on the ears and the accompanying hospitalization will be about $1,400.00.

42. Plaintiff will also require a graft for the right elbow. This surgery will be fairly complicated and will require four separate hospitalizations for a total of thirty days A reasonable charge for the surgery is $1,750.00,

and a reasonable charge for the required hospitalization is $3,000.00, or a total cost of $4,750.00.

43. The scars on the left forearm have been treated by X-ray. Such scars often break down and malignancy may develop, especially when there has been extensive X-ray treatment.

44. All the scarring is permanent. Plaintiff has a total physical disability of thirty percent as a result of the scarring. He has a fifty percent cosmetic disability, although this may be reduced by future surgical procedures.

45. Plaintiff has a life expectancy of about thirty-eight years. For his past and future pain and suffering, his disability because of his scarring, his disfigurement and his impairment of earning capacity, plaintiff is entitled to the sum of $57,000.

46. Plaintiff is entitled to damages of $74,350.00.

47. Subsequent to his injury, plaintiff received benefits from defendant under the South Dakota Workmen's Compensation Law. Benefits were paid for 119 6/7 weeks at $38.00 per week, for a total of $4,554.57, which amount defendant is entitled to have deducted from the verdict. Defendant has also paid $3,939.49 in medical and hospital bills, and has agreed to pay the cost of the 1967 surgery and hospitalization in Rochester at the Mayo Clinic and St. Mary's Hospital.

CONCLUSIONS OF LAW.

1. Plaintiff was a shore-based worker on a vessel in navigation doing a seaman's work and was within the class of workers protected by a warranty of seaworthiness.

2. Plaintiff's injuries were a direct result of a breach of the warranty of seaworthiness by defendant.

3. Plaintiff is entitled to recover damages for his injuries caused by the breach of the warranty of seaworthiness.

4. Plaintiff has not been guilty of laches.

ORDER FOR JUDGMENT.

Judgment will be entered for plaintiff and against defendant in the sum of Sixty-nine Thousand Seven Hun-Hundred Ninety-five Dollars and Forty-three cents ($69,795.43), together with costs and disbursements.

June 9, 1970. /s/ EARL R. LARSON,
United States District Judge.

Memorandum Attached.

MEMORANDUM.

The facts of this case have been set out in detail by the Court in its Findings of Fact and will not be repeated here. Based on those findings, it is apparent that plaintiff may recover damages for a breach of warranty of seaworthiness if he fits into the category of a shore-based worker injured on a vessel in navigation while doing a seaman's work. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *Reed v. The Yaka*, 373 U.S. 410 (1963); *Jackson v. Lykes Steamship Co.*, 386 U.S. 731 (1967).

It is clear that a "vessel" need not be the traditional ocean going vessel to be subject to a warranty of seaworthiness. The definition includes a variety of special purpose craft, many of which have no motive power of their own, and even includes relatively permanent or stationary structures. *Offshore Company v. Robinson*, 266 F.2d 769 (5th Cir. 1959); *United States v. Moran Towing and Transportation Co.*, 374 F.2d 656 (4th Cir. 1967); *Summerlin v. Massman Construction Co.*, 199 F.2d 715 (4th Cir. 1952); *Producers' Drilling Co. v. Grey*, 361

F.2d 432 (5th Cir. 1966). The S2 derrick barge is a special purpose craft which is clearly a "vessel" within the standards established by those cases.

It is stipulated that the Fort Randall Reservoir is a navigable water as that term has been defined by the Supreme Court.

Under the *Sieracki* doctrine, the warranty of seaworthiness extends to a shore worker who "is, in short, a seaman . . . doing a seaman's work and incurring a seaman's hazards." *Sieracki, supra*, at p. 95. The fact that Peck was by label an ironworker is not determinative of his right to the warranty of seaworthiness. The type of work engaged in by plaintiff at the time of his injury was the type traditionally done by seamen and was of the general type of maintenance work that would have continued when the vessel was at the bridge site. *Socony-Vacuum Oil Company, Inc. v. Lawlor*, 275 F.2d 599 (2nd Cir. 1959), *cert. den.* 363 U.S. 844 (1960); *The Tungus v. Skovgaard*, 358 U.S. 588 (1959). See also *Christiansen v. United States*, 94 F. Supp. 934 (D.C. Mass. 1951), *aff'd* 192 F.2d 199 (1st Cir. 1951); *Torres v. The Kastor*, 227 F.2d 664 (2nd Cir. 1955); *Crawford v. Pope & Talbot, Inc.*, 206 F.2d 784 (3rd Cir. 1953); *Landsburg v. Acadia Overseas Freighters, Ltd.*, 219 F.2d 440 (3rd Cir. 1955).

The test for determining whether a vessel is "in navigation" is the "status of the ship." *West v. United States*, 361 U.S. 118, 122 (1959). Defendant argues that the S2 derrick was not completed and that therefore no warranty of seaworthiness could attach. There is language to support defendant's position:

> "The warranty of seaworthiness has never been divided into fragments; a ship is either fitted for her duties in all respects, or she is not fitted at all . . . . There is not a syllable in the books to suggest that that the warranty attaches seriatim as part by part

is made ready for service." *Latus v. United States*, 277 F.2d 264 (2nd Cir. 1960).

But the facts of this case are distinguishable from *Latus* and other cases where a vessel has been found to be out of navigation by reason of still being under construction or being in port or drydock undergoing major renovation.

Defendant here treated the S2 derrick barge as though it was completed and in condition for use for one of its design purposes. The decision to use the S2 derrick barge was admittedly a negligent one because in fact there was more work that should have been done, *i.e.*, completing the welding on the rear sill beam. But to hold plaintiff is deprived of his remedy because defendant chose to act as though the vessel was ready for use when it was not would lead to a result completely incongruous with the purpose of the warranty.

There is considerable force in the argument that shipbuilding is non-maritime, but defendant's reliance on *West v. United States*, 361 U.S. 118 (1959), and *Roper v. United States*, 368 U.S. 20 (1961), is misplaced. In *West*, a deactivated ship was at a repair dock undergoing major renovation designed to make her seaworthy. The vessel was in the hands of the ship repair contractor for a complete overhaul, including cleaning and repair of the defective valve which produced injury to West. The Court said:

"This undertaking was not 'ship's work' but a complete overhaul of such nature, magnitude, and importance as to require the vessel to be turned over to a ship repair contractor and docked for the sole purpose of making her seaworthy. It would be an unfair contradiction to say that the owner held the vessel out as seaworthy in such a case. It would appear that the focus should be on the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done, rather than the specific type

of work that each of the numerous shore-based workmen is doing on shipboard at the moment of injury." 361 U.S. at p. 122.

The factors which serve to distinguish this case from the situation that were explicitly recognized:

". . . the vessels involved in the cases depended upon by petitioner were, at the times of the injuries, in the hands and under the control of the owners or charterers and, instead of undergoing general repairs, were in active maritime service in the course of loading or unloading cargo pursuant to voyages. The workmen, like the seamen, depended upon the seaworthiness of the ships, their equipment, and gear. They were obliged to work with whatever the shipowners supplied and it was only fair for the latter to be subjected to the absolute warranty that the ships were seaworthy." 361 U.S. at p. 121.

Similarly in *Roper*, a de-activated Liberty ship used as a grain warehouse had been towed from one location to another. The accident occurred during the unloading of grain while the ship was moored at its new berth. The Supreme Court affirmed the trial court's finding that the act of towing the vessel from one berth to another was not sufficient to place an otherwise obviously de-activated ship "in navigation." The vessel was not prepared for use as a barge or converted to any navigational use. But here the S2 derrick was being readied for such a use, and on the day of the accident defendant determined that it was ready for such a use.

Defendant here was in complete control of the S2 derrick. The decision as to when this vessel was ready for use rested exclusively with defendant. Defendant's foreman, Ralston, in deciding to make the lift of the Tisco tug, warranted to the workmen on board that the vessel was seaworthy, that is, that the equipment and gear were in proper condition for the use to which they were to be put. When

the equipment failed, plaintiff and others were exposed to serious hazards, including drowning, burning or being struck by falling materials. Under those circumstances, the warranty was clearly breached.

The injury to plaintiff was not directly related to any construction work on the S2 derrick. He was not injured in the course of repairing a defect. He was not injured in the course of doing some work to complete construction. He was injured because the defendant determined that the vessel was ready to be used when, in fact, it was not.

The final question to be determined is the claim that plaintiff was guilty of laches. The law requires that both inexcusable delay on the part of the plaintiff and prejudice to the defendant because of the delay be present before laches will apply to bar the action. Measuring laches by the analogous three-year statute of limitations under the Jones Act would be unwarranted in this case, since there is ample evidence that defendant has not been prejudiced in any way by the late filing of this action. *West v. Upper Mississippi Towing Corp.*, 221 F. Supp. 590 (D.C. Minn. 1963), appeal dismissed in *Upper Mississippi Towing Corp. v. West*, 388 F.2d 823 (8th Cir. 1964).

However, the equitable determination for laches cannot be used in determining whether a Jones Act claim may be maintained. There is no evidence that plaintiff relied on any misrepresentation of a material fact by Weekman, defendant's claims agent, or that Weekman's advice was in any way responsible for the delay in filing of this suit. This case is therefore not within *Scarborough v. Atlantic Coast Line R. Co.*, 178 F.2d 253 (4th Cir. 1949), or *Burnett v. New York Central R. Co.*, 380 U.S. 424 (1964). Therefore, the Jones Act claim is barred. 45 U.S.C. § 56.

For the above reasons, plaintiff is entitled to judgment.

EARL R. LARSON

OPINION OF THE COURT OF APPEALS.

No. 20,468

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

FRANCIS R. PECK,
Appellee,

v.

UNITED STATES STEEL CORPORATION,
Appellant.

Appeal from the United States District Court for the District of Minnesota, Fourth Division.

[August 19, 1971.]

Before GIBSON and Ross, Circuit Judges, and EISELE, District Judges.*

PER CURIAM.

This is an action by Francis R. Peck against the United States Steel Corporation, his employer, to recover for personal injuries which he sustained while engaged in the course of his employment. The case was tried without a jury before United States District Judge Earl R. Larson. Judgment was entered in favor of plaintiff in the amount of $69,795.43. United States Steel appeals, urging that the trial court erred in finding that Peck, a shore-based worker, was injured on a vessel in navigation while doing seaman's work, and in concluding that he was entitled to the warranty of seaworthiness.

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* United States District Judge, Eastern District of Arkansas, sitting by designation.

The findings of fact by the trial court are not clearly erroneous. Judge Larson correctly applied the law to the facts as found.

The judgment of the District Court is affirmed on the basis of the District Court's opinion reported at 315 F. Supp. 905 (1970).

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT OF THE COURT OF APPEALS.

No. 20468

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

September Term, 1970

FRANCIS R. PECK,
Appellee,

vs.

UNITED STATES STEEL CORPORATION,
a corporation,
Appellant.

Appeal from the United States District Court
For the District of Minnesota.

This Cause came on to be heard on the record from the United States District Court for the District of Minnesota and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby affirmed.

August 20, 1971

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In The

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-556

UNITED STATES STEEL CORPORATION,

Petitioner,

vs.

FRANCIS R. PECK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Petitioner's brief misstates the nature of the legal issue, or issues, sought to be reviewed. These issues are whether the Findings of Fact made by the trial court, sitting without a jury, that the derrick barge was a vessel in navigation and the respondent's work was such as to entitle him to the protection of seaworthiness were clearly erroneous. The Court of Appeals in an opinion now reported as *Peck v. U. S. Steel Corp.*, 446 F.2d 891 (8th Cir. 1971), decided the Findings were not clearly erroneous and that the trial court correctly applied the law to the facts as found.

STATEMENT OF FACTS AND OF THE CASE

The statement of petitioner was prepared in disregard of the applicable principles of review that the evidence is to be viewed and construed favorably to the prevailing party below, and all reasonable inferences of which the evidence is fairly susceptible should be drawn in support of, and not against, the judgment rendered below.

Petitioner adopts verbatim the first eight Findings as a part of its Statement, but condenses and paraphrases the vital and important Findings numbers 9 to 18 and numbers 24 and 25. The version on pages 5, 6 and 7 of the Petition is at variance in important respects with the actual Findings. Hence, in the interest of brevity and accuracy, we adopt as our Statement of Facts the complete Findings made by the trial court and sustained by the Court of Appeals, which will be found in the Appendix to the Petition, pages 17 to 27. However, the only Findings relative to the issues raised by this appeal are numbers 1 to 25, inclusive. Findings 26, et seq., relate to matters presently of no helpful relevance.

The legal principles which govern decision here have been well established by this court and the federal courts generally for many years, especially since the days of *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), and *Reed v. The Yaka*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963).

Petitioner seeks to have this case reviewed because of the supposed necessity of determining the exact perimeter of the rule permitting a shore-based worker to recover under the doctrine of seaworthiness. It is not only unnecessary in the case at bar to define the precise scope of this doctrine, but it is legally impossible to arrive at a final and ultimate solution which will anticipate all future problems and factual situations. Courts always have and always will have some

problems in the application of legal principles, howsoever well settled, to varying sets of facts.

It cannot be reasonably disputed that under settled principles the respondent is entitled to recover damages if

(1) The derrick barge was a vessel under admiralty law, and

(2) The vessel was in navigation within the meaning of admiralty law, and

(3) The respondent was doing work usually done by seamen or essential to the mission of the vessel.

That the S-2 derrick barge was a vessel was established overwhelmingly. As said in *U. S. v. Moran Towing and Transp. Co.*, 374 F.2d 656 (4th Cir. 1967):

> "We have held several strange crafts to be vessels. A floating derrick engaged in pouring concrete for a bridge is one. So is a barge moored behind piles on a river bank and serving as a platform for coal cleaning machinery. We have held that a floating pile driver is a vessel. There are similar holdings elsewhere. Even an off shore drilling platform resting on legs extending to the bottom of the sea has been held to be a vessel."

The following authorities will be sufficient to establish that this statement is in accordance with the overwhelming weight of judicial authority: *Summerlin v. Massman Construction Co.*, 199 F.2d 715 (4th Cir. 1952), involving a floating derrick; *Producers Drilling Co. v. Grey*, 361 F.2d 432 (5th Cir. 1966), involving a drilling rig; *City of Los Angeles v. United Dredging Co.*, 14 F.2d 364 (9th Cir. 1926), involving a dredge; *Brown v. L. A. Wells Construct. Co.*, 143 Ohio 580, 56 N.E.2d 451, involving a scow; *Shamrock Towing Co. v. Fichter Steel Corp.*, 155 F.2d 69 (2nd Cir. 1946); *The Showboat*, 47 F.2d 286 (1930); *Jeffrey v. Henderson Bros.*, 193 F.2d 589 (4th Cir. 1951); *Hill v. Diamond*,

311 F.2d 789 (4th Cir. 1962); and *Chenevert v. Clinch Drilling Co.*, 273 F. Supp. 943 (1967).

It was stipulated that the vessel, at all determinative times, was upon navigable waters of the United States (App. 90). The trial court found as a fact and concluded as a matter of law that the vessel was in navigation at the time of the accident (App. 17-20; 25). In determining whether a vessel is "in navigation" the courts have consistently emphasized not one but a variety of factors:

(1) Who had control of the craft?

(2) Were other crew members on board?

(3) What were the special purposes of the craft?

(4) Was the employee on board in aid of one of such purposes?

(5) Was the vessel in use for one of its designed purposes?

(6) Was it subject to any of the perils of navigation at the time?

We submit that as a matter of law these questions should be answered in favor of respondent. The derrick was operating and functioning and being used to lift an object far heavier and far more closely related to navigation than a steel beam or girder, namely, a tug boat. The respondent was cleaning up the deck and had finished coiling the anchor cables (App. 40; 65). The craft was subject to the buffeting of high winds and high waves, even to such an extent that the foreman would have to arouse himself in the nighttime to determine whether the mooring cables were too slack or too taut (App. 69, 81). At the time of the derrick collapse the barge was under the exclusive control of petitioner, its owner, and not under the control of any independent shipyard or repair facilities. Petitioner was solely responsible

for the defective condition of unseaworthiness which caused the collapse. It appears without dispute that at the time of the accident the derrick barge was being used for one of its designed purposes, namely, lifting.

Many of the above factors were discussed and many were held to be determinative in *Lawlor v. Socony-Vacuum Oil Co.*, 275 F.2d 599 (2nd Cir. 1960); *Moye v. Sioux City & New Orleans Barge Lines, Inc.*, 402 F.2d 238 (5th Cir. 1968); and *John M. Watz v. Zapata Off-Shore Co.*, 431 F.2d 100 (5th Cir. 1970).

The doctrine of unseaworthiness has been extended to longshoremen and other shore-based workers since *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), where a longshoreman was engaged in loading and unloading a vessel, the theory being that he was "doing a seaman's work and incurring a seaman's hazards".

There is nothing talismanic about the phrase "loading" or "unloading"; the unseaworthy doctrine has been applied to shorebased workers not engaged in loading or unloading, such as the carpenter employed by a refitting company doing repair work in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953). The fact that Hawn was repairing something connected with the loading apparatus was a mere coincidence. He was a carpenter performing a ship's service. Since respondent was doing the work of a deckhand and work traditionally done by seamen, he is in the same position as a crew member. The justification commonly used for the warranty of seaworthiness is best summarized in the case of *Reed v. The Yaka*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed. 448 (1963), where the court, referring to *Sieracki*, said:

> "The hazards of marine service, the helplessness of men to ward off the perils of unseaworthiness, the harsh-

> ness of forcing them to shoulder their losses alone, and the broad range of the 'humanitarian policies' of the doctrine of seaworthiness, we held not to depend upon any kind of contract. 328 U.S. at 93-95, 66 S.Ct. at 876-877. We further held that the Longshoremen's and Harbor Workers Act was not intended to take away from longshoremen the traditional remedies of the sea, so that recovery for unseaworthiness could be had notwithstanding the availability of compensation."

By analogy, *Offshore Company v. Robison*, 266 F.2d 769 (5 Cir. 1959), is interesting and helpful. The question was: When is a roughneck a seaman? In a scholarly opinion the court concluded that such terms as "vessel", "seaman" and "member of a crew", have such a wide range of meaning that, except in rare cases, only a jury or trier of facts can determine their application in the circumstances of a particular case. "Even where the facts are largely undisputed, the question at issue is not solely a question of law when, because of conflicting inferences that may lead to different conclusions among reasonable men, a trial judge can not state an unvarying rule of law that fits the facts."

The court held that a seaman on a drilling rig, anchored in coastal waters, may be exposed to more hazards than blue water sailors, such as the collapse of top-heavy drilling barges. The remark is as applicable to respondent as it was to Robison:

> "There is no reason for lamentations. Expansion of the terms 'seaman' and 'vessel' are consistent with the liberal construction of the Act that has characterized it from the beginning and is consistent with its purposes. Within broad limits of what is reasonable, Congress has seen fit to allow juries to decide who are seamen under the Jones Act."

Directly in point that Peck falls within the protected class is *Blair v. U. S. Steel Corp.*, 312 F. Supp. 293 (W.D. Pa. 1970), wherein Judge Gourley said:

> "In determining whether to extend the doctrine (seaworthiness) to the facts of this case. the court has considered what must be brought to the forefront at all times—the humanitarian policy of the doctrine of unseaworthiness. Consideration must be given to the hazards of marine service, the helplessness of the men to learn or know of, and ward off, the perils of unseaworthiness * * * the duty to provide a seaworthy vessel is rooted, not in contracts, but in the hazards of the work of the person required to go upon the vessel to perform duties and pursue his employment at all times of the day and night and varying conditions and circumstances."

PETITIONER'S AUTHORITIES DISTINGUISHED

Petitioner relies principally upon *Usner v. Luckerbach Overseas Corp.*, 91 S.Ct. 514 (1971), and *Guerrini v. U. S.*, 167 F.2d 352 (2nd Cir. 1948). When the quotations from *Usner* and *Guerrini* relied upon by petitioner are read in context, it will be found that neither case has any helpful relevance.

In *Usner* a longshoreman was injured when the winch operator lowered the boom and the fall, too far and too fast, knocking him to the deck. There was nothing wrong with any of the equipment. The plaintiff there claimed unseaworthiness, but could establish nothing except negligence on the part of the winch operator, his fellow employee. Both were employed by the stevedoring company, who was directing the work as an independent contractor. The cause of the plaintiff's injuries was "not the condition of the ship, her appurtenances, her cargo or her crew but the isolated personal negligent act of the petitioner's fellow longshoreman." Where there was no condition of unseaworthiness, the court refused to hold the ship owner liable for a third party's single act of negligence. In the case at bar the immediate cause of the accident was the condition of the rear

leg of the tower as explained by the trial court in Findings 24 and 25 (App. Pet. Br. 23).

Again, the *Guerrini* case was solely a negligence case. The ship was alongside the dock of the Continental shipyards, a contractor, apparently for general overhauling, and the Bell Contracting Company was employed as a subcontractor. Plaintiff was an employee of the subcontractor. He slipped and fell. The court refused to extend *Sieracki* and liability for unseaworthiness to the employee of a subcontractor or "to all workmen upon a ship, however casual their presence there", stating that such an innovation should await the sanction of the Supreme Court. A very different picture is presented in the case at bar where respondent was performing the work of a deck hand, and we respectfully suggest that no extension of the *Sieracki* doctrine is necessary to sustain the decision of the courts below. In *Guerrini* the case was sent back to the trial court for more specific findings on the issue of negligence because the Findings of the trial court were not sufficient to permit final disposition of the case. There is no such question raised in the case at bar.

West v. U. S., 361 U.S. 118, 80 S.Ct. 189, 4 L.Ed.2d 161 (1959), distinguishes itself:

> "Petitioner overlooks that here the respondent had no control over the vessels, or power either to supervise or to control the repair work in which petitioner was engaged. We believe this to be decisive against both aspects of plaintiff's dual theory."

In *Roper v. U. S.*, 368 U.S. 20, 82 S.Ct. 5, 7 L.Ed.2d 1 (1961), the ship was deactivated, mothballed and disemboweled; it joined the dead fleet and was used as a granary for the storage of grain. Two years later, while it was in the sole and exclusive custody and control of the Continental Grain Company, the plaintiff, a longshoreman employed by a stevedoring company, sustained his injuries. It was held

that the trial court's findings that she was a dead ship and not in navigation were not clearly erroneous.

Frankel v. Bethlehem-Fairchild Shipyard, Inc., 132 F.2d 634 (4th Cir. 1942), involved solely the question of whether plaintiff was a seaman under the Jones Act. He was a handyman employed by a shipbuilding company. He was injured while installing machinery. In his suit solely under the Jones Act, the trial court held he was not a seaman and the Court of Appeals affirmed primarily because the contract to build the ship was nonmaritime and plaintiff was not a member of a crew and had no duties relating to navigation.

CONCLUSION

It is respectfully submitted that petitioner has wholly failed to sustain its burden of establishing under Rule 19 that there are special and important reasons why the writ should be granted. The decision below did not involve an important question of federal law which has not been, but should be, settled by this court; nor has the Court of Appeals decided a federal question in a way to conflict with applicable decisions of this court or of another Court of Appeals on the same matter. The Court of Appeals correctly held the Findings of Fact and Conclusions of Law of the trial court were not clearly erroneous.

Respectfully submitted,

WILLIAM H. DEPARCQ
JAMES R. SCHWEBEL
DEPARCQ, ANDERSON, PERL & HUNEGS
565 Pillsbury Building
Minneapolis, Minnesota 55402
Tel.: (612) 339-4511
Attorneys for Respondent

CERTIORARI DENIED N.C.R.